Supreme Court, U.S.
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No. 96-1461

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

vs.

LARRY LYONS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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A. INTRODUCTION

On January 22, 1997 the United States Court of Appeals for the Sixth Circuit in Lyons v. Ohio Adult Parole Authority et. al., 105 F.3d 1063 (6th Cir. 1997) construed the interplay between amended versions of Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253. In Lyons, the Sixth Circuit concluded that the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "the Act"or AEDPA), continues to empower district courts to issue certificates of appealability in habeas petitions filed pursuant to 28 U.S.C. § 2254. Id. at 1076.

On March 14, 1997, Petitioners filed a petition for *writ of certiorari* with this Court in which the following two questions were presented for review:

> I. WHETHER COURTS OF APPEALS HAVE AUTHORITY TO ISSUE CERTIFICATES OF APPEALABILITY UNDER 28 U.S.C. § 2253 (c) (1)(A), AS AMENDED BY THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996?
>
> II. WHETHER THE STANDARD FOR ISSUING A CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. § 2253 REMAINS THE SAME AS THE PREVIOUS STANDARD FOR ISSUING A CERTIFICATE OF PROBABLE CAUSE?

(Petition for *Writ of Certiorari*, p. i)

After considering the arguments advanced herein, Respondent requests that this Court enter an order denying the petition for *writ of certiorari* in the case *sub judice*.

B. STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to consider the first question presented. However, this Court cannot properly exercise its discretionary jurisdiction over the second question presented because it is a newly presented argument which may not be considered. Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2 (1970).

C. STATEMENT OF THE CASE

The opinion of the United States Court of Appeals for the Sixth Circuit in Lyons correctly sets forth the procedural history of this case. However, in its petition for *writ of certiorari*, Petitioners misstate a fact that must be corrected. Petitioners state that Respondent filed a notice of appeal and a motion seeking the issuance of a certificate of probable cause on April 24, 1996. (Petition for *Writ of Certiorari*, p. 4). April 24, 1996 is a significant date in this case because it is the date on which President Clinton signed "the Act" into law. As the Sixth Circuit correctly stated in its opinion in Lyons, "On April 21, 1996, Lyons delivered his notice of appeal and request for a certificate of probable cause to a prison official to file with the court." Lyons, 105 F. 3d at 1065.

According to Rule 4(c) of the Federal Rules of Appellate Procedure and Houston v. Lack, 487 U.S. 266 (1988), the date on which an imprisoned *pro se* litigant deposits court documents with prison officials is the date on which the documents are "filed" with the court. Thus, Respondent filed a notice of appeal and a motion for the issuance of a certificate of probable cause on April 21, 1996.

D. PETITIONERS' REASONS FOR GRANTING THE WRIT

Petitioners articulate five reasons for granting *certiorari* in the case *sub judice*: (1) The number of conflicting decisions and intra-circuit rules governing the role of the district courts in the certification process; (2) The certification question affects all appeals of §2254 petitions which are denied by district courts; (3) The Lyons decision "potentially dilutes one of the most important objectives of "the Act" (i.e., streamlining habeas review of state-court criminal convictions)"; (4) "The Act" alters the threshold showing for obtaining a certificate of

appealability; and (5) "When Congress amends a jurisdictional statute and a rule in opposite directions, it is fair to dignify the statutory change before the rule change." (Petition for *Writ of Certiorari*, pp. 5-6, 10).

E. RESPONDENT'S REASONS FOR DENYING THE WRIT

Respondent submits that of the five reasons articulated by Petitioners for granting *certiorari* in this case, only the second reason could possibly justify this Court's decision to accept this case for further review. The first, third, fourth, and fifth reasons, neither individually nor collectively, would support a decision by this Court to exercise its discretionary jurisdiction.

I. THERE IS NO SPLIT OF AUTHORITY OR INTRA-CIRCUIT CONFLICT.

Petitioners first point to the "number of conflicting decisions and intra-circuit rules" as a reason for granting *certiorari* in this case. Petitioners' take the position that the First, Seventh, and Tenth Circuits all have promulgated local rules that recognize a role for the district courts in the certification process. (Petition for *Writ of Certiorari*, pp. 6-7).

Petitioners proceed to claim that Fourth Circuit Rule 22(a) "allows only the court of appeals" to issue certificates. (Petition for *Writ of Certiorari*, p. 7). However a close review of Fourth Circuit Rule 22(a) reveals that the rule does not specifically eliminate district courts from the certification process. Instead, Fourth Circuit Rule 22(a) appears to govern applications for certificates of appealability that are directly filed in the Fourth Circuit as opposed to motions that are filed in the district courts that are located within the jurisdiction of the Fourth Circuit. (Petition for *Writ of Certiorari*, p. A-55).

This interpretation is supported by an Order entered by Fourth Circuit Judge Widener on March 24, 1997 in Satcher v. Netherland, No. 96-22 wherein the court declined to consider a

motion for the issuance of a certificate of appealability until the motion was first presented to the district judge who had denied the habeas petition. A copy of Judge Widener's decision in Satcher v. Netherland, No. 96-22 is attached hereto as Appendix A.

Petitioners also rely on the "split of authority" within the circuits as support for their argument that this Court should issue a *writ of certiorari*. (Petition for *Writ of Certiorari*, p. 7). Petitioners cite the following circuit courts of appeals cases that all support the existence of a role for the district courts in the certification process: Lyons v. Ohio Adult Parole Authority, 105 F. 3d 1063 (6th Cir. 1997); Hunter v. United States, 101 F. 3d 1565 (11th Cir. 1996) (*en banc*); Else v. Johnson, 104 F. 3d 82 (5th Cir. 1997); United States v. Asrar, ---F. 3d ---, 1997 WL 85792 (9th Cir. March 3, 1997); and Lozada v. United States, ---F. 3d---, 1997 WL 99719 (2nd Cir. March 7, 1997). (Petition for *Writ of Certiorari*, p. 7).

Surprisingly, Petitioners proceed to cite this Court to Hohn v. United States, 99 F. 3d 892 (8th Cir. 1996) as a case that stands for the proposition that "district courts [sic] judges may not issue binding certificates of appealability." (Petition for *Writ of Certiorari*, p. 7). However, a careful review of the Hohn decision leads to the unassailable conclusion that this decision does not stand for the proposition of law for which it is cited by the Petitioners. There is nothing in the text of the Eighth Circuit's opinion in Hohn which forbids district courts from issuing binding certificates of appealability. Furthermore, the Lyons case is a habeas case prosecuted pursuant to 28 U.S.C. § 2254 while the court in Hohn reviewed a federal conviction pursuant to 28 U.S.C. § 2255.

In its discussion of the perceived "split of authority," Petitioners neglect to mention two very important facts about the district court opinions that are discussed on page seven of its

petition. First, Houchin v. Zavaras, 924 F. Supp. 115 (D. Colo. 1996) was affirmed by the Tenth Circuit Court of Appeals in Houchin v. Zavaras, --- F. 3d ---, 1997 WL 81157 (10th Cir. February 27, 1997). Second, Petitioners omitted to point out that no circuit court of appeals has adopted the rationale articulated by Judge Eisele in Parker v. Norris, 929 F. Supp. 1190 (E.D. Ark. 1996) wherein the district court held that only courts of appeals may issue binding certificates of appealability. In his opinion, Judge Eisele twice pointed out that his conclusion was not free from doubt. Id. at 1192-93. The Sixth Circuit in Lyons specifically stated that it was unable to locate any decisions that adopted the Parker analysis. Lyons, 105 F. 3d at 1069, n. 10.

In conclusion, a careful review of the local circuit rules cited by Petitioners clearly shows that there is no apparent "intra-circuit" conflict that exists that would justify the issuance of a *writ of certiorari* in the case *sub judice*. Moreover, there is no conflict within the applicable circuit courts of appeals decisional law that would support the issuance a *writ of certiorari* in this case.

II. DISTRICT COURT PARTICIPATION IN THE CERTIFICATION PROCESS STREAMLINES THE HABEAS REVIEW PROCESS.

Petitioners' second argument for issuing a *writ of certiorari* is that retaining the district courts in the certification process "potentially dilutes one of the most important objectives of the Act (i.e, streamlining habeas review of state-court criminal convictions)." (Petition for *Writ of Certiorari*, p. 6). Both the Petitioners and the Respondent agreed in the Sixth Circuit that the primary goal of "the Act" was to make the habeas system more efficient so that habeas petitioners are afforded procedural due process in exchange for a truncated appellate review procedure that "curbs the abuse of the statutory writ of habeas corpus." 142 Cong. Rec. H3305-

01, H3333 (April 15, 1996).

Respondent herein submits that by permitting district courts to issue certificates of appealability, as they have for almost ninety years, amended versions of Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253 vindicate the express purpose of "the Act." A district court judge is in the best position, of any jurist, to determine whether appellate review of a dismissed habeas petition would be worthwhile. A circuit judge or justice would need to devote precious time and resources to evaluate a request for the issuance of a certificate of appealability to achieve the same level of knowledge and understanding of the habeas petition that a district court judge had already obtained.

The court in Lyons recognized the public policy to be served by "the Act" when it stated that "Congress enacted the AEDPA to streamline habeas corpus process, particularly in capital cases, without violating prisoners' due process rights. . . . Congress would thus appear to favor a reading of the statute which would expedite the appeals process." Id. at 1072. In recognizing the purpose behind "the Act," the Sixth Circuit held that:

> It is not clear to us whether restricting issuance of certificates of appealability to circuit judges or permitting district judges to issue certificates would necessarily lead to speedier resolution of habeas appeals. Courts are not well-suited to answering such empirical questions. However, we believe that efficiency considerations point toward permitting district judges to issue certificates of appealability, consistent with the detailed framework of Rule 22(b).

Id.

Thus, Respondent herein contends that the Sixth Circuit's conclusion that district courts continue to play an important role in the certification process of habeas appeals vindicates the stated public policy of "the Act."

III. THE AEDPA DOES NOT CHANGE THE THRESHOLD SHOWING FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY.

The third reason Petitioners articulate for the issuance of a *writ of certiorari* in the case *sub judice* is that "the Act" changes the threshold showing for the issuance of a certificate of appealability in habeas cases. Respondent maintained in the Sixth Circuit that "although the label for the certificates have changed, the definition found in 28 U.S.C. § 2253(c)(2) is nothing more than a codification of the standard elucidated in Barefoot." (citing to Barefoot v. Estelle, 463 U.S. 880 (1983)). (Brief of Appellant filed in the Sixth Circuit Court of Appeals on July 11, 1997, p. 16).

In the Sixth Circuit, Petitioners recognized this concession on the certification question and did not maintain that the new certification process presented a more rigorous standard than was encountered prior to April 24, 1996. (Reply Brief of Appellee filed in the Sixth Circuit on August 1, 1997, p. 2).

The court's decision in Lyons, reflected this apparent agreement between the Petitioners and Respondent when it stated that "The AEDPA thus makes no change to the general showing required to obtain a certificate, and, aside from the new specificity requirement discussed below, essentially makes only a change in nomenclature from a "certificate of probable cause" to a "certificate of appealability." Id. at 1073. Since neither Petitioners nor Respondent advocated that the change in the certification process affected the quantum of proof needed to secure the issuance of the certificate, this issue does not present this Court with a case or controversy over which it can exercise its jurisdiction. Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2 (1970).

IV. THE CERTIFICATION ISSUE AFFECTS ALL HABEAS APPEALS BUT INTERVENTION BY THIS COURT IS NOT NEEDED SINCE THE CIRCUITS ARE CONSISTENTLY RESOLVING THE CONFLICT BETWEEN 28 U.S.C. § 2253 AND FEDERAL RULE OF APPELLATE PROCEDURE 22(b).

Petitioners urge this Court to exercise its discretionary jurisdiction in this case because the certification issue affects all §2254 petitions which are denied by district courts. Respondent concedes that there are numerous cases which would be affected by this Court's decision concerning the role of the district courts in the certification process after Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253 were amended. Moreover, this issue is capable of repetition each time a habeas petition is denied. However, as was previously demonstrated, since the circuit courts of appeals have consistently held that the district courts have a role in the certification process, this issue appears to be settled and will not be treated differently depending on the jurisdiction in which the habeas petitioner is incarcerated.

Petitioners argue that a result of the Sixth Circuit's decision in Lyons is that "a central compromise reached in amending this area of the law was simply to substitute a new name for an old procedure." (Petition for *Writ of Certiorari*, p. 10). However, this argument is not supported by any reasonable interpretation of "the Act" and thus cannot be a basis for this Court's exercise of its discretionary jurisdiction.

The change of the phrase from "certificate of probable cause" to "certificate of appealability" involved more than relabeling this important procedure in habeas cases. In addition to a change in the nomenclature, "the Act" also broadens the certification requirement to include habeas actions prosecuted by federal prisoners pursuant to 28 U.S.C. § 2255 which heretofore were immune from the certification requirement.

Moreover, "the Act" also modified the certification process by requiring the judges or justices who are reviewing the habeas petition to examine each claim in the petition and make a decision as to whether the claim makes a substantial showing of the denial of a constitutional right. This requirement restricts appellate review to those issues that are approved in the certificate, rather than all of the issues presented in the habeas petition. Thus, there is no support for Petitioners' spurious argument that a central purpose of the habeas reform movement is defeated if the district courts continue to play a role in the certification process.

V. SINCE 28 U.S.C. § 2253 AND FEDERAL RULE OF APPELLATE PROCEDURE 22(b) ARE NOT JURISDICTIONAL ENACTMENTS, NEITHER THE SUPERSESSION CLAUSE NOR FEDERAL RULE OF APPELLATE PROCEDURE 1(b) CAN BE USED TO RESOLVE ANY CONFLICT BETWEEN THE TWO ENACTMENTS.

Finally, Petitioners continue to misapply Henderson v. United States, ---U.S.--- , 116 S. Ct. 1638 (1996) and United States v. Sasser, 971 F. 2d 470 (10th Cir. 1992), cert. denied, 507 U.S. 924 (1993) to this case. Title 28 U.S.C. § 2072(b) makes it clear that all statutes in conflict with the rules "shall be of no further force or effect after such rules have taken effect." This second sentence of 28 U.S.C. § 2072(b) is known as the "supersession clause" and it subordinates all laws, including Acts of Congress, to rules subsequently promulgated pursuant to 28 U.S.C. § 2072(a).

In addition to using the supersession clause, Petitioners take an inconsistent position by advocating the use of Federal Rule of Appellate Procedure 1(b) to resolve the conflict between Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253. Federal Rule of Appellate 1(b) provides that: "These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law."

In Henderson, this Court addressed a conflict between the service of process requirements of a provision of the Federal Rules of Civil Procedure and a statute that preexisted the enactment of the rule. Since the statute in question was not a "jurisdictional statute," this Court used the supersession clause to conclude that the service of process requirements of the applicable Federal Rule of Civil Procedure overrode the service requirements of the statute with which the rule conflicted.

In Sasser, the Tenth Circuit confronted a situation where a "jurisdictional" statute that established the time for filing a notice of appeal conflicted with the deadline specified in a provision of the Federal Rules of Appellate Procedure that was amended after the statute was enacted. The Tenth Circuit found that since the statute under consideration was "jurisdictional" and Federal Rule of Appellate Procedure 1(b) did not permit the rules to be used to extend or limit the jurisdiction of the court, the deadline of the statute prevailed over the filing deadline of the Federal Rule of Appellate Procedure.

In its petition for *writ of certiorari,* when it is convenient, Petitioners refer to the certification process as a "procedure." (Petition for *Writ of Certiorari*, p. 8-three times, p. 10-one time). In other sections of the petition, the process is labeled to be "jurisdictional." (Petition for *Writ of Certiorari*, p. 10-one time). Petitioners cannot have it both ways. After reviewing Henderson, Sasser, Federal Rule of Appellate Procedure 1(b), and 28 U.S.C. § 2072(b), in order to evaluate Petitioners' argument, it is necessary to determine whether Rule 22(b) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253 are considered to be "jurisdictional" or "procedural."

In the case *sub judice*, 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b) are not jurisdictional, but instead are more appropriately labeled procedural. It is settled law that if a habeas petitioner files a notice of appeal, but not a motion for the issuance of a certificate, the notice of appeal is construed to be both a notice of appeal and a request for the issuance of a certificate. Hernandez v. Starbuck, 69 F.3d 1089, 1090 n.1 (10th Cir. 1995), cert. denied, 116 S. Ct. 1855 (1996).

However, if a habeas petitioner files a motion for the issuance of a certificate and not a notice of appeal, the motion would not be construed to be a proper notice of appeal and jurisdiction would not vest in the court of appeals. Hayward v. Britt, 572 F. 2d 1324 (9th Cir. 1978). Moreover, in Martin v. United States, 96 F. 3d 853 (7th Cir. 1996), the Seventh Circuit found that the certification process was a procedural part of a habeas appeal. Id. at 855. Finally, in Emerson v. Gramley, 91 F. 3d 898 (7th Cir. 1996) and Watkins v. Meloy, 95 F. 3d 4 (7th Cir. 1996), the Seventh Circuit found that "the Act" did not affect the subject matter jurisdiction of federal courts.

Accordingly, since neither 28 U.S.C. § 2253 nor Federal Rule of Appellate Procedure 22(b) are jurisdictional enactments and both were enacted simultaneously, neither the supersession clause nor Federal Rule of Appellate Procedure 1(b) can be used to resolve any apparent conflict between the procedural rule and statute.

F. CONSOLIDATION WITH HUNTER V. UNITED STATES

Respondent agrees with Petitioners that if this Court issues a *writ of certiorari* in this case, then it should be consolidated with Hunter v. United States, 101 F. 3d 1565 (11th Cir. 1996) (*en banc*). However, the Eleventh Circuit's decision in Hunter is a consolidation of two

cases, Hunter v. United States and Bailey v. Nagle. Both cases address the role of the district courts in the habeas certification process. However, the Hunter decision addresses the role of district courts in § 2255 cases while the Nagle decision addresses the role of the district courts in § 2254 cases.

Petitioners are incorrect in arguing that "the Hunter case presents certificate of appealability issues both for §2254 and § 2255 appeals, while this case just presents the issue in the context of state prisoners." (Petition for *Writ of Certiorari*, p. 12). The petition for *writ of certiorari* filed with this Court in Hunter reveals that the only issue on which the State of Alabama is seeking review is contained in the Nagle component of the Hunter decision. The United States Justice Department, which represented the United States in the Hunter component, conceded in the Eleventh Circuit that district courts can issue certificates of appealability in § 2255 cases. Hunter, 101 F.3d at 1574. Thus, the role of district courts in § 2255 cases is not under consideration by this Court in Hunter.

G. CONCLUSION

For the reasons articulated herein, the *writ of certiorari* should be denied.

Respectfully submitted,

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FILED: March 24, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-22

MICHAEL CHARLES SATCHER,

Petitioner-Appellee,

versus

J. D. METHERLAND, Warden,

Respondent-Appellant.

No. 96-23

MICHAEL CHARLES SATCHER,

Petitioner-Appellant,

versus

J. D. METHERLAND, Warden,

Respondent-Appellee.

O R D E R

We have considered the motion of Satcher filed March 18, 1997 for a certificate of appealability.

It is ORDERED that we decline to consider the motion until after the same has been first presented to the district judge who entered the judgment appealed from.

With the concurrences of Judge Williams and Judge Michael.

A True Copy, Teste:
Patricia S. Connor, Clerk
BY _____
Deputy Clerk

/s/ H. E. Widener, Jr.
For the Court

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